Supreme Court, U.S.
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BEFORE THE
SUPREME COURT OF THE UNITED STATES

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| YOUNG IN HONG, | ) | |
| | ) | |
| Petitioner,) | | |
| | ) | NO. A-372 |
| - vs - | ) | |
| | ) | |
| CHILDREN'S MEMORIAL HOSPITAL, | ) | |
| | ) | |
| Respondent. | ) | |

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# PETITION FOR WRIT OF CERTIORARI

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52 pp

## QUESTIONS PRESENTED FOR REVIEW

I. WHAT IS THE PROPER BURDEN OF PROOF TO ESTABLISH A PRIMA FACIE CASE UNDER TITLE VII ON SUMMARY JUDGEMENT?

II. WHETHER THE PETITIONER ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION UNDER TITLE VII?

## LIST OF PARTIES TO THE PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

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| YOUNG IN HONG, | ) |
| | ) |
| Petitioner, | ) |
| | ) |
| - vs - | ) |
| | ) |
| CHILDREN'S MEMORIAL HOSPITAL, | ) |
| | ) |
| Respondent. | ) |

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

YOUNG IN HONG, the Petitioner herein, respectfully prays that a Writ of Certiorari be granted to review the Judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-titled case on May 12, 1993.

## OPINIONS BELOW

The May 12, 1993, Opinion of the Court of Appeals, whose Judgment is herein sought to be reviewed, is reported at 993 F.2d. 1257, a copy of which is contained in the Appendix to this Petition, A-1. The prior Opinion of the United States District Court for the Northern District of Illinois, entered on March 10, 1992, is unpublished. The Order and Transcript of the District Court's Decision are attached to the Appendix at A-10.

## STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on May 12, 1993. A Petition for Rehearing was denied on July 22, 1993. On October 27, 1993, Justice John Paul Stevens granted the Petitioner until December 27, 1993, to file her Petition for a Writ of Certiorari. The jurisdiction of this Court is invoked pursuant to 28 USC, 1254(1).

## STATEMENT OF THE CASE

The Petitioner, YOUNG IN HONG, filed an action against the Respondent on February 12, 1990, under Title VII, 42 USC, 2000e-2 for discriminating against her because of her national origin, Korean. Record on Appeal [hereinafter cited to as R___], Complaint. The Petitioner worked as a Medical Technologist at the CHILDREN'S MEMORIAL HOSPITAL since 1968. *Hong vs. Children's Memorial Hospital,* 993 F.2d. 1257,1259 (7th Cir 1993). She was terminated in October of 1987. *Id.* at 1259-1260. Petitioner alleges that her termination was based on her nationality, Korean. R 1, Complaint.

MS. HONG's Immediate Supervisor during the relevant time period was Ms. Marina Barrientos, a non-Korean. *Id.* at 1259. Dr. Frederick Smith, was the Head of the Chemistry Department at the Hospital where Petitioner worked. *Id.* Mr. Smith was not of Korean ancestry either.

Prior to 1985, Petitioner always received favorable performance evaluations. *Id.* In 1985, and in 1986, Petitioner received evaluation scores of 230 and 225. *Id.* at 1262. A score of 100 is considered to be marginal, and a score of 200 is considered to be competent. *Id.* In 1987, Petitioner was given a rating of 140. Petitioner's Supervisor, Ms. Barrientos, was responsible for the Petitioner's evaluations. *Id.* at 1259.

During the Petitioner's first seventeen (17) years of employment, she did not receive any written discipline. Hearing Transcript of District Court Decision, p. 10; Appendix to this Petition, p.20 [hereinafter cited to as A-___]. Beginning in February of 1986, Ms. Barrientos began to issue discipline against the Petitioner. Dr. Smith stated that he was aware of what he described as a personality conflict between Petitioner and Ms. Barrientos. Nevertheless, in

October of 1987, Dr. Smith approved of a decision to terminate the Petitioner. *Id.* at 1260. This decision was allegedly based on a performance evaluation prepared by Barrientos and on discipline issued by Barrientos.

The Respondent filed a Motion for Summary Judgment on January 7, 1992, arguing that there was insufficient evidence to support a claim for discrimination. Respondent contended that Petitioner was terminated because of her disciplinary record and performance. R 51, Summary Judgment Memorandum. In her Response Memorandum, Petitioner presented evidence of statements made by Ms. Barrientos and Dr. Smith, referring to her Korean nationality. Petitioner's Response to Defendant's Motion for Summary Judgment. R, Plaintiff's Response to Defendant's Motion for Summary Judgment. Petitioner also presented evidence as to two (2) non-Korean employees who were disciplined and had a poor performance evaluation but who were not terminated as of October of 1987, when Petitioner was discharged. R, Petitioner's Response Memorandum.

The District granted the Respondent's Motion holding that Petitioner could not establish a prima facie case, and that a directed verdict would be warranted if the evidence, as outlined by the Petitioner, were presented to a jury. A-24-25. On appeal, the Circuit Court of Appeals for the Seventh Circuit affirmed this Decision holding that Petitioner had not established a prima facie case. 993 F.2d at 1262. The Seventh Circuit also affirmed an evidentiary ruling by the District Court and refused to consider a statement made by Dr. Smith to the Petitioner's brother-in-law because the statement was considered to be double hearsay. *Id.* at 1265. Dr. Smith's statement was that the Petitioner should move back to Korea.

In her Appellate Brief and Petition for Rehearing, Petitioner argued that she had presented a prima facie case and that the statement by Dr. Smith was not hearsay.

## REASONS FOR GRANTING WRIT OF CERTIORARI

This case concerns the proper standard for establishing a prima facie case of discrimination, especially when defending against a Summary Judgment Motion. There is a split among

the various Circuit Courts of Appeal as to what the proper standard and elements are. The Supreme Court has not specifically and clearly addressed this issue in a manner that would impose uniformity on the Circuit Courts of Appeal when using this standard.

In the First Circuit, the Petitioner must establish that he or she was qualified for the position, was terminated, and the position was then offered to similarly qualified employees after Petitioner was terminated. *Pogano vs. Frank*, 983 F.2d 343 (1st Cir. 1993). The Second Circuit, in *Song vs. Ives*, requires that the Petitioner must present evidence to show that he performed his duties satisfactory, was discharged under circumstances suggesting that discrimination was a factor, and that the Defendant sought to hire other applicants. 957 F.2d 1041 (2nd Cir. 1992).

In *Ezold vs. Wolf, Block, Schorr and Solis-Cohen*, the Third Circuit stated that in a trial setting, the Petitioner must establish that she was qualified for a position, was rejected or terminated from the position, and that an employee outside the Petitioner's minority group was treated better than the Petitioner. 983 F.2d 509, 522 (3rd Cir. 1992). *Ezold* made it clear, however, that this is an easy standard to meet. *Id.* at 523. *Ezold* also explained that disputes over subjective evaluations should only be resolved at the second and third stages of the *McDonnell Douglas* analysis, not at the prima facie case stage. *Id.* This is necessary to avoid imposing "too onerous" of a burden on the Petitioner in making out a prima facie case. *Id.*

In *Wileman vs. Frank*, the Fourth Circuit explained that the Petitioner must prove a prima facie case by eliminating the most common non-discriminatory reason for the Petitioner's rejection. 979 F.2d. 30, 33 (4th Cir. 1992). Another Fourth Circuit case indicated that for a prima facie case, the Petitioner must show that the prohibited conduct engaged in was similar to what other employees did who were not members of the class, and that the discipline imposed against the Petitioner was more severe than what was imposed on the other employees. *Cook vs. CSX Transportation Company*, 988 F.2d 507, 511 (4th Cir).

The Fifth Circuit noted that a prima facie case of

discrimination is met by showing that the Petitioner was qualified, was terminated, and then replaced by another employee who was not a member of the Petitioner's class. *Frazier vs. Garrison ISD,* 980 F.2d 1514 ( 5th Cir 1993). In *Galbraith vs. Northern Telecom Inc.,* the Sixth Circuit explained that a prima facie case may be made by proving that an adverse action was taken under circumstances giving rise to an inference of discrimination. 944 F.2d 275 (6th Cir 1991).

In *Sischo-Nownwjad vs. Merced Community College,* the Ninth Circuit explained that the Petitioner need only show that discrimination played a motivating part in the decision to terminate the Petitioner in a mixed motive case. 934 F.2d 1104, 1110 (9th Cir.) (emphasis added). The Ninth Circuit emphasized that the amount of evidence needed for a prima facie case was "very little". *Id.* at 1110-11. Once a prima case is established, Summary Judgment should normally be denied even if the employer articulates a non-discriminatory reason because once a prima facie case is established, the Petitioner will "necessarily" have raised a genuine issue of fact as to the validity of the Defendant's articulated reason. *Id.* at 1111. The Court explained that it only required a "little" evidence because the ultimate issue "can only be resolved through a searching inquiry". *Id.*

In *Notari vs. Denver Water Department,* the Tenth Circuit stated that Petitioner could make a prima facie case by producing enough evidence to raise a probability that but for the Petitioner's classification, the challenged employment decision would have favored the Petitioner. 971 F.2d 1104, 590 (10th Cir 1991). The Eleventh Circuit, in *Weaver vs. Gallardo,* explained that a prima facie case could be met by establishing that the Petitioner was qualified for a position, was terminated, and that (a) the position was filled by a non-minority employee, (b) that other employees with similar qualifications were retained, or (c) disciplinary rules were not applied equally. 922 F.2d 1515, 1525 (11th Cir. 1991).

The Seventh Circuit, in the instant case explained that a Petitioner establishes a prima facie case by proving that the Petitioner is a member of a protected class, her work performance met her employer's legitimate expectations,

Petitioner was terminated in spite of those qualifications, and the employer sought a replacement. *Hong*, 993 F.2d at 1261. The Court in *Hong* also acknowledged that Summary Judgment was usually inappropriate in a Title VII case when the Defendant's intent is at issue. *Id.* The Court even acknowledged that under *Trans World Airlines Inc. vs. Thurston*, 469 US 111, 121 (1985), the elements of a prima facie case are simple to prove in order to guarantee that a Petitioner has his day in Court despite the unavailability of direct evidence. *Id.* at 1262.

The court in *Hong*, however, did not follow this simple burden of proof standard which it referred to in its opinion. Rather, the Court applied a rigid analysis to Petitioner's evidence and applied a very strict standard for proving a prima facie case on Summary Judgment.

Petitioner provided evidence that her Supervisor, Ms. Barrientos, had told her on more than one (1) occasion, and under circumstances showing animosity, that Petitioner should "learn to speak English". R, Petitioner's deposition p. 89-92, attached to the Appendix to Respondent's Summary Judgment Motion; *Id.* at 1265. These statements were made most often in 1987, which was the year in which she was terminated. Petitioner's Dep. pp. 89-90. Ms. Barrientos was the individual who issued the performance evaluations to Petitioner and who issued much of the discipline against her. R, Deposition of Dr. Smith, pp. 16-17, contained in the Supplemental Appendix to Respondent's Summary Judgment Motion. Since it is Petitioner's contention that the performance evaluations were subjective, Ms. Barrientos' derogatory statements to Petitioner to speak English become very relevant.

Petitioner also stated at her deposition that Dr. Smith, who approved of the final decision to terminate Petitioner, had told Petitioner's brother-in-law that Petitioner should "move back to Korea". R, Petitioner's Dep. pp. 92-93. This statement was rejected by both the District Court and the Seventh Circuit because it was hearsay. Both Courts rejected the Petitioner's argument that the statement was not being offered for its truth, namely, that Petitioner should in fact move back to Korea. The Courts also rejected the claim that

the statement was admissible as showing the doctor's state of mind. Neither the parties nor the Courts, however, considered the point that the statement was also an admission by an agent. Petitioner's brother-in-law was an employee of the Respondent and met with Dr. Smith to discuss Petitioner's termination. Since both Dr. Smith and the brother-in-law were agents of the Respondent, Dr. Smith's statement should have been admitted.

The Respondent argued that Petitioner was terminated because of her disciplinary record. In response, Petitioner selected the most recent discipline which was issued against her on July 31, 1987, as an example of how the Respondent unfairly chose to single her out based on false allegations. The July 31, 1987, letter of warning referred to three (3) events occurring on July 14th, July 20th, and July 30, 1987. R, Petitioner's Exhibit 2; Supplemental Appendix to Summary Judgment Motion. Not only did Petitioner rebut each of the allegations referred to in the July 31, 1987 letter, Petitioner also testified in her deposition that another employee was responsible for each of the acts. Petitioner's Deposition, pp. 69-72; 97-98; Smith Dep., pp. 44, 47-49. In fact, Petitioner pointed out that Ms. Barrientos herself was at fault for one (1) of these events. Petitioner's Dep., pp. 69-72. Respondent, however, never disciplined nor investigated the other employees to determine their responsibility.

The District Court and the Seventh Circuit both found that Petitioner could not prove a prima facie case without refuting each and every one of the incidents of discipline against her. *Hong* at 1263-64. The fact that Petitioner chose the most recent instance, excluding her termination notice, as an *example* of the improper discipline, was deemed to be insufficient. The Court also severely limited the probative value of the discriminatory statements made by Barrientos.

When the Petitioner's evidence and arguments are scrutinized under the various standards for establishing a prima facie case among the Circuit Courts of Appeal, it is evident that she has easily established a prima facie case under some of these standards. Under some of the more stringent standards, however, it could be said, for the sake of argument, that she would have a more difficult time in convincing the

Court that she has proved a prima facie case. This lack of consistency among the Circuits is untenable and should be reviewed by this Court.

## CONCLUSION

WHEREFORE, the Petitioner respectfully requests that her Petition for a Writ of Certiorari be granted. In the event that this Writ is granted, Petitioner requests that the Judgment of the Seventh Circuit, and District Court be reversed and that a new or uniform method for establishing a prima facie case on a Summary Judgment Motion be established.

Respectfully submitted,

GOLDMAN AND MARCUS

# APPENDIX

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: May 13, 1993

BEFORE: Honorable Michael S. Kanne, Circuit Judge
Honorable Ilana D. Rovner, Circuit Judge
Honorable John W. Reynolds, Senior District Judge*

NO. 92-1802

YOUNG IN HONG,
Plaintiff-Appellant
v.
CHILDREN'S MEMORIAL HOSPITAL,
Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 90 C 827, James B. Zagel, Judge

This cause was heard on the record from the above-mentioned District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on May 12, 1993.

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* The Honorable John W. Reynolds, Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.

(1061-040593)

**Young In HONG, Plaintiff-Appellant,**
**v.**
**CHILDREN'S MEMORIAL HOSPITAL,**
**Defendant-Appellee.**
**No. 92-1802.**

United States Court of Appeals, Seventh Circuit.
Argued Nov. 10, 1992.
Decided May 12, 1993.
Rehearing and Rehearing In Banc Denied July 22, 1993.

Former employee filed Title VII action, claiming that her discharge had been based on her national origin. The United States District Court for the Northern District of Illinois, James B. Zagel, J., dismissed for failure to exhaust state administrative remedies, and employee appealed. The Court of Appeals, 936 F.2d 967, reversed. On remand, the District Court granted summary judgment for the employer. Appeal was taken. The Court of Appeals, Kanne, Circuit Judge, held that: (1) the employee failed to show that she was meeting her employer's legitimate job expectations at the time of the discharge, and (2) the evidence offered to show that national origin was a factor in the discharge was not sufficient to preclude summary judgment.

Affirmed.

**1. Federal Civil Procedure**

If nonmovant faces burden of proof on issue, she may not rest on the pleadings and must affirmatively set forth specific facts showing that there is genuine issue of material fact which would preclude summary judgment. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

**2. Civil Rights**

To prevail on disparate treatment claim under Title VII, plaintiff must prove that she was victim of intentional discrimination. Civil Rights Act of 1964, § 701 et seq. 42 U.S.C.A. § 2000e et seq.

**3. Civil Rights**

Intentional discrimination, as element of disparate treatment claim under Title VII, may be established through direct proof of discriminatory intent or through indirect, burden-shifting method under *McDonnell Douglas*. Civil Rights Act of 1964, § 701 et seq. 42 U.S.C.A. § 2000e et seq.

**4. Civil Rights**

Under *McDonnell Douglas* framework, prima facie case of employment discrimination creates rebuttable presumption that employer's actions, if unexplained, were result of impermissible factors and shifts burden of production to employer to articulate some legitimate, nondiscriminatory reason for its actions; if employer satisfies that burden, plaintiff must then show that articulated reasons were pretextual. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

**5. Civil Rights**

Ultimate burden of persuading trier of fact that employer intentionally discriminated against plaintiff remains at all times with plaintiff in Title VII action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

**6. Civil Rights**

To establish prima facie case of national origin discrimination, plaintiff must show that she is member of protected class, that she was doing her work well enough to meet her employer's legitimate expectations, that she was discharged despite her performance, and that employer sought replacement for her. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

**7. Federal Civil Procedure**

Without prima facie case,plaintiff cannot withstand summary judgment in Title VII action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq; Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A.

**8. Civil Rights**

Employee must show in Title VII action that her performance was adequate at time of her discharge, not merely that her performance was adequate at some time during her employment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

**9. Civil Rights**

Employee of Korean ancestry failed to show that she was meeting her employer's legitimate job demands at time of her discharge and, thus, did not establish prima facie case of discrimination on basis of national origin. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

**10. Civil Rights**

Employee of Korean ancestry failed to show disparate treatment in her job evaluations or in employer's disciplinary actions before her discharge that had allegedly been based on her national origin; she did not show that her evaluations were comparable to those of non-Korean employees or that non-Korean employees with similar numbers of disciplinary reports had been retained. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

**11. Civil Rights**

Employer's acceptance of employee's work without express reservations is sufficient to show that employee was performing satisfactorily, for purpose of shifting burden of production in Title VII action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

**12. Federal Civil Procedure**

Factual dispute about one of seven disciplinary notices in former employee's file was insufficient to preclude summary judgment in Title VII action challenging discharge that had allegedly been based on employee's Korean ancestry; substance of six other notices had not been controverted and those notices were sufficient to show that employee was not meeting employer's legitimate work expectations at time of

her discharge. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

**13. Civil Rights**

Employee who seeks to establish prima facie case of discriminatory discharge need not disprove source of her employer's dissatisfaction of which she is unaware. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

**14. Evidence**

Employee's deposition testimony that her brother-in-law reported that employer had told brother-in-law that employee should "move back to Korea" was hearsay in employment discrimination action challenging discharge that had allegedly been based on national origin; brother-in-law was declarant and employee offered statement to show that employer said what brother-in-law reported to her. Fed.Rules Evid.Rule 801(c), 28 U.S.C.A.

**15. Evidence**

Employee's deposition testimony that her brother-in-law reported that employer had told brother-in-law that employee should "move back to Korea" was not admissible under state of mind exception to hearsay rule; employee's brother-in-law was declarant and his state of mind was not at issue in action challenging discharge that had allegedly been based on national origin. Fed.Rules Evid.Rule 803(3), 28 U.S.C.A.

**16. Civil Rights**

Evidence that employee's supervisor told her to "learn to speak English" was insufficient to establish pretext after employer met its burden of production by showing that allegedly discriminatory discharge had been based on poor work performance; although statement could have been seen as evidence of supervisor's discriminatory animus, there was no showing that statement had been related to employee's discharge. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

**17. Civil Rights**

Evidence of supervisor's occasional or sporadic use of slur directed at employees' race, ethnicity, or national origin is generally not enough to support claim under Title VII, absent showing that remarks are related to employer's decisional process. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Jill L. Kline (argued), Oshkosh, WI, for plaintiff-appellant.

Donald F. Peters, Jr., Thomas T. Cavanaugh (argued) and Ann Haule, Children's Memorial Hosp., Chicago, IL, for defendant-appellee.

Before KANNE and ROVNER, Circuit Judges, and REYNOLDS, Senior District Judge.*

*The Honorable John W. Reynolds, Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.

KANNE, Circuit Judge.

Young In Hong, an American citizen of Korean ancestry, sued Children's Memorial Hospital under Title VII, alleging that she was unlawfully discharged from her employment because of her national origin. The district court granted summary judgment for the defendant. We affirm.

I.

Children's Memorial Hospital hired Young In Hong in November 1968 as a medical technologist in the hospital's Clinical Chemistry Laboratory. As a technologist, Ms. Hong conducted tests on patient specimens in accordance with hospital procedures and quality control measures. She worked part-time until October 15, 1976, when she was made a full-time medical technologist, or "Medical Technologist II." In April 1981, as the result of an across-the-board salary adjustment applicable to all medical technologists working in the laboratory, Ms. Hong's employment classification was changed to that of a "Medical Technologist III."

From 1976 until her discharge in October 1987, Ms. Hong's immediate supervisor was Marina Barrientos. As one of her responsibilities, Ms. Barrientos conducted annual performance appraisals of Ms. Hong's work. The record shows that,

prior to 1985, these reviews were generally favorable. Dr. Frederick Smith, Division Head of the Department of Clinical Pathology at Children's Memorial Hospital, supervised the Clinical Chemistry Laboratory, but did not participate in either annual evaluations of medical technologists or informal disciplinary matters.

Beginning in early 1986, the hospital commenced an internal evaluation of its laboratory operations for the purpose of upgrading equipment and technology, and improving overall performance. In addition to installing more modern instrumentation, Dr. Smith implemented a computerized quality control system for use in specimen testing. All medical technologists received training in the new procedures and on the new instruments.

In 1985, 1986, and 1987, Ms. Hong's annual performance evaluation scores steadily declined. Among other things, she was cited for excessive absenteeism, failure to perform assigned tasks in a timely manner, failure to identify instrument malfunctions during testing procedures, failure to report test results to her supervisors, failure to maintain laboratory inventory, and failure to follow the laboratory's quality control and management procedures. In addition, from February 1986 to July 1987, Ms. Hong was issued seven formal written disciplinary notices for deficiencies in her work and uncooperative behavior. Two of these reports resulted in probationary periods of two and three months, a third resulted in a two-day suspension. She also received informal counselling from her superiors, including additional training on the new quality control instruments.

On March 5, 1987, Dr. Smith sent Ms. Hong a memorandum informing her of the two month probation mentioned above and explaining that unless her performance on the job improved to an acceptable level during that period she would be discharged. Seven months later, on October 20, after yet another formal disciplinary notice, Dr. Smith sent Ms. Hong a memorandum stating that her term of employment in the Clinical Chemistry Laboratory was at an end. The memo indicated that staff are obliged to conduct laboratory work reliably and quickly for the benefit of patients and that Ms. Hong's poor performance record over the previous year and a

half was simply unsatisfactory. She was encouraged to seek other suitable positions within the hospital, and was advised of her right to file an internal grievance. She did file a grievance, and received a hearing before a committee composed of hospital management and staff. The committee affirmed Dr. Smith's decision.

Ms. Hong then brought this suit in federal district court, averring that Children's Memorial Hospital had wrongfully discharged her from its employ because of her Korean ancestry, in violation of Title VII of the 1964 Civil Rights Act. The hospital filed an answer to the complaint and moved for summary judgment on the grounds that the plaintiff had failed to establish a prima facie case of discriminatory discharge or; in the alternative, assuming the existence of a prima facie case, had failed to produce sufficient evidence from which a jury could find that the hospital's stated reason for discharging her—inadequate job performance—was a pretext for unlawful discrimination. The district court granted the motion, concluding that the case was "too thin to permit a trier of fact to return a verdict for Hong" because she had produced "insufficient evidence to refute the claim that her work was not meeting her employer's reasonable expectations of job performance at the time she was fired and a fortiori to show that the stated reason [for discharge] is a pretext."

On appeal, the plaintiff points to four actions by her superiors at Children's Memorial Hospital to substantiate her claim of intentional discrimination. First, she alleges that, after her discharge, her now deceased brother-in-law, who was then working part-time at the hospital, visited Dr. Smith. According to the plaintiff, Smith told her brother-in-law that Ms. Hong should "move back to Korea." Second, the plaintiff claims that her supervisor, Marina Barrientos, told her repeatedly at work to "learn to speak English," despite the absence of evidence that the plaintiff spoke anything other than English. This disparaging remark was usually made on occasions when Ms. Barrientos had made some mistake, and sometimes for no apparent reason. What's more, according to the plaintiff, Ms. Barrientos made the remark most often in 1987, the year in which the plaintiff

received her lowest performance evaluation score, was subjected to the most disciplinary actions, and ultimately discharged.

Third, the plaintiff alleges that certain of the disciplinary actions taken against her in 1987 near the time of her discharge evidence discriminatory treatment and present genuine issues of material fact precluding summary judgment. Specifically, she disputes the defendant's version of three instances of substandard work that, in addition to two others, resulted in the issuance of a formal disciplinary notice and a two-day suspension from work. Finally, the plaintiff claims that she was singled out for disciplinary action, and that non-Korean medical technologists with comparable annual evaluation scores were not discharged. This evidence of disparate treatment[1], the plaintiff submits, demonstrates that the hospital's stated reason for discharging her was pretextual.

1. In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n 15, 97 S.Ct 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977), the Supreme Court described disparate treatment as "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."

II.

Because there appears to be some disagreement between the parties on the issue, we begin by setting forth the correct standard of review. We review *de novo* a district court's grant of summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure, examining the entire record in a light most favorable to the party opposing the motion to determine whether any genuine issues of material fact exist. *McCoy v. WGN Continental Broadcasting Company*, 967 F.2d 368, 370 (7th Cir. 1992). Application of Rule 56 involves "the threshold injury of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 920 (1986).[2]

2. We have elsewhere described the "practical" test for summary judgment as "whether the nonmovant has a fighting chance at trial." *Shager v. Upjohn Company*, 913 F.2d 398, 403 (7th Cir.1990).

[1] We recognize that summary judgment is often an inappropriate method of resolving Title VII claims in which the defendant's intent, as the plaintiff urges here, is the central issue. *See Friedel v. City of Madison*, 832 F.2d 965, 972 (7th Cir.1987); *Powers v. Dole*, 782 F.2d 689, 694 (7th Cir.1986). However, a plaintiff facing the prospect of summary adjudication cannot "sit back and simply poke holes in the moving party's summary judgment motion." *Fitzpatrick v. Catholic Bishop of Chicago*, 916, F.2d 1264, 1256 (7th Cir.1990). If the nonmovant bears the burden of proof on an issue, she may not rest on the pleadings; rather, she must affirmatively set forth specific facts showing that there is a genuine issue of material fact. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-26, 106 S.Ct. 2548, 2552-54, 91 L.Ed.2d 265 (1986). *See also Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 567 (7th Cir.1989).

[2, 3] To ultimately prevail on a disparate treatment claim under Title VII, the plaintiff must prove that she was a victim of intentional discrimination. *See Morgan v. Harris Trust and Savings bank of Chicago*, 867 F.2d 1023, 1026 (7th Cir.1989) (per curiam). The plaintiff can satisfy her burden of proof either through direct proof of discriminatory intent, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), or through the indirect, burden-shifting method of proof articulated in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). These two methods constitute distinct evidentiary paths available to an individual attempting to prove intentional discrimination. In this case, Ms. Hong relies on the indirect, burden-shifting method of proof.

[4, 5] Under the *McDonnell Douglas* framework, the plaintiff must first establish, by a preponderance of the evidence, a prima facie case of employment discrimination. *Id.* at 802, 93 S.Ct. 16 1824. Once established, the prima facie case creates a rebuttable presumption that the employer's

actions, if unexplained, were the result of unpermissible factors. *Chesser v. State of Illinois,* 896 F.2d 830, 333 n. 3 (7th Cir.1990). At this point, the defendant must explain its actions or lose, *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); the burden of production therefore shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for the plaintiff's treatment. *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824. If the defendant carries its burden, the presumption of discrimination drops from the case, *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403 (1983), and the plaintiff must then show, again by a preponderance of the evidence, that she is a victim of intentional discrimination, the defendant's stated reason for dismissal being nothing more than a mere pretext. *McDonnell Douglas,* 411 S.Ct. at 804, 93 S.Ct. at 1825; *See also Villa v. City of Chicago,* 924 F.2d 629, 631 (7th Cir.1991). At all times, of course, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains with the plaintiff. *Burdine,* 450 U.S. at 253, 101 S.Ct. 16 1093.

[6, 7] To establish a prima facie case of national origin discrimination, the plaintiff is required to show that (1) she is a member of a protected class, (2) she was doing her work well enough to meet her employer's legitimate expectations, (3) despite her performance, she was discharged, and (4) her employer sought a replacement for her. *Villa,* 924 F.2d at 631. Without a prima facie case, the plaintiff cannot withstand summary judgment. *See Gilty v. Village of Oak Park,* 919 F.2d 1247, 1250 (7th Cir.1990). In a recent case we observed:

> The initial elements of the prima facie case are relatively simple to prove. The elements and the subsequent "shifting burden of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" *Trans World Airlines, Inc. v Thurston,* 469 U.S. 111, 121, 106 S.Ct. 613, 622, 83 L.Ed.2d 523 (1986) (quoting *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1014 (1st Cir.1979) ). Thus where the nonmovant is unable to establish at least the minimal

> elements of the prima facie case under the *McDonnell Douglas* methodology, the entry of a summary judgment is required. *See Celotex Corp.*, 477 U.S. at 322, 106 S.Ct. at 2552. It is axiomatic that there can be no genuine issues of material fact if the plaintiff is unable to establish a prima facie case "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323, 106 S.Ct. at 2553.

*Randle*, 876 F.2d at 568 (alteration in original).

The district court ruled that the plaintiff had failed to show that she was meeting her employer's legitimate job expectations at the time she was fired and, as a result, could not make out a prima facie case of discrimination. We agree.

[8] As an element of her prima facie case, the plaintiff was required to show that her performance on the job was adequate. *See Shager v. Upjohn Company*, 913 F.2d at 400; *Yarbrough v Tower Oldsmobile, Inc.*, 789 F.2d 508, 511 n. 4 (7th Cir.1986). She cannot satisfy this requirement by showing that her performance was adequate for some period of time during her employment at Children's Memorial Hospital, however. The critical issue is whether she was performing well in her job at the time of her termination. *See Karazanos v. Navistar International Transportation Corporation*, 948 F.2d 332, 336 (7th Cir.1991).

[9] In the Clinical Chemistry Laboratory, medical technologists receive annual written evaluations scored on a range from 100 points (quality and quantity of work is "marginal") to 400 points (quality and quality of work is "consistently exceptional"). A score of 200 denotes competency, while a score of 300 "exceeds expectations." We accept the plaintiff's contention that here evaluations for the better part of her first seventeen years at the hospital were favorable. We also credit her assertion that her performance scores for 1981-1984 were consistently between "exceeds expectations" and "consistently exceptional."

In 1985, the plaintiff received a total evaluation score of 230 and had no written disciplinary notices in her file. The following year she received a score of 225 and, in 1987, a score of 140. She offers the evaluations, particularly the last, as

evidence of disparate treatment inasmuch as other, non-Korean medical technologists who received "similar scores" on their evaluations were not discharged. The plaintiff does not dispute that identical pre-printed appraisal forms are used to evaluate all medical technologists, nor does she contend that the criteria used in evaluations are unrelated to job performance or otherwise suspect. More importantly, she does not challenge Dr. Smith's testimony that the hospital considers an employee's disciplinary record as well as annual evaluation scores to measure job performance.[3]

3. The plaintiff's evaluations for 1985-1987 include comments concerning unacceptable work and specify dates of disciplinary action taken as a result of poor performance.

[10] Against the record in this case, the plaintiff's bare assertion of disparate treatment is not persuasive. First, she has not presented sufficient evidence that her annual evaluation scores were comparable to those of other medical technologists who were not discharged by the hospital. Indeed, all of the non-Korean technologists to whom the plaintiff refers in her brief to this court had higher evaluation scores than she did in 1986 and 1987. The only technologist with an annual score comparatively close to the plaintiff's 1987 score of 140 was Iqbal Mohammed, who received a score of 185. The plaintiff points to this, in her words, "less than adequate" score, the two disciplinary notices issued to Ms. Mohammed that year, and the fact that Ms. Mohammed was not discharged as proof of disparate treatment.

As a rule, this court will "not sit as a super-personnel department that reexamines an entity's business decisions" in cases where discrimination is alleged. *Dale v. Chicago Tribune Company,* 797 F.2d 458, 464 (7th Cir.1986), *cert. denied,* 479 U.S. 1066, 107 S.Ct. 964, 93 L.Ed.2d 1002 (1987). Children's Memorial Hospital is in a better position than this court to assess the relative qualifications of its employees and to determine when an employee's performance is so deficient as to potentially compromise the level of care to which patients are entitled. In 1987, Ms. Mohammed had a higher evaluation score and half as many disciplinary notices as the plaintiff. That the hospital did not discharge Ms.

Mohammed as well as the plaintiff is hardly evidence of disparate treatment. Rather, it appears to be a business decision within the defendant's sound discretion.

Furthermore, the record in this case supports the hospital's argument that it takes disciplinary notices seriously. No technologist retained by the hospital was involved in as many disciplinary actions as the plaintiff.[4] In fact, just the opposite is true. As the plaintiff concedes, the one technologist with a comparable disciplinary record suffered the same fate. Delberto Camposagrado was involved in eleven disciplinary actions, formal and informal, over a period of eleven months before being discharged in 1988. Insofar as the plaintiff has produced insufficient evidence that other, non-Korean, medical technologists were similarly situated and not discharged, she has failed to show disparate treatment based on annual evaluation scores.

4. The defendant puts at nine the total number of counselling and disciplinary matters, including discharge, in which Ms. Hong was involved.

[11] The plaintiff's claim that her disciplinary record is itself the result of discriminatory treatment is also unavailing. The short of the matter is that she has failed to adequately address the defendant's evidence of her substandard job performance in 1986 and 1987.[5] This evidence comprises seven formal disciplinary notices, many of which were the result of several instances of deficient work. In her brief to this court, the plaintiff addresses the incidents that led to but one of these notices, written by Dr. Smith and dated July 31, 1987. She does not argue that this particular disciplinary action was itself motivated by discriminatory intent on the part of her employer. Rather, she admits that mistakes in the lab were made, but denies responsibility for three of the five events leading up to, and culminating in, the July 31 memorandum. These events include the plaintiff's alleged failure to deliver a work order, her neglect of a patient specimen, and her failure to empty a laboratory freezer.[6] The crux of the plaintiff's argument is that essential facts concerning these events, and relevant to the issue of her termination, are disputed by the parties and summary

judgment should therefore be denied in favor of resolving the issue at trial.

5. We have long recognized that an employer's acceptance of work without express reservation is sufficient to show that the plaintiff was performing satisfactorily for the purpose of shifting the burden of proof. *Flowers v. Crouch-Walker Corporation,* 552 F.2d 1277, 1283 (7th Cir.1977).
6. Although the plaintiff complains that the medical technologists responsible for failing to deliver the work order and neglecting the patient specimen were not sought out and questioned, she does not identify these individuals. Indeed, at her deposition the plaintiff could offer nothing beyond a blanket denial of responsibility for the events in question.

[12] A factual dispute does not preclude summary judgment unless, of course, the disputed fact is outcome determinative under the governing law. *Egger v. Phillips,* 710 F.2d 292, 296 (7th Cir.), *cert. denied,* 464 U.S. 918, 104 S.Ct. 284, 78 L.Ed.2d 262 (1983). For this reason, we say that "where the *undisputed facts* demonstrate that one party is entitled to judgment as a matter of law, summary judgment in favor of that party is entirely appropriate." *Collins v. American Optometric Association,* 693 F.2d 636, 639 (7th Cir.1982). On seven different occasions the plaintiff was issued notices detailing repeated problems in operating the laboratory's quality control instruments. A disagreement over the correct version of events culminating in *one* of the notices—even if we view the evidence, as we must, in a light most favorable to the plaintiff—does not qualify as a disputed issue of material fact concerning the prima facie element of adequate job performance. *Cf. Tankha v Costle,* 536 F.Supp.480, 482 (N.D.Ill.1982) (summary judgment for defendant denied in Title VII case in which the plaintiff rebutted defendants' claims of inadequate job performance "almost point-by-point").

The plaintiff does not attempt to controvert the substance of the six other disciplinary notices she received, nor does she claim that they were the product of discrimination. She offers no evidence that these actions were the result of illegitimate or arbitrary demands by her employer, *see Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1223 (7th

Cir.1980), *cert. denied,* 450 U.S. 969, 101 S.Ct. 1418, 67 L.Ed.2d 383 (1981), or that other, non-Korean, laboratory employees were not disciplined for similar performance deficiencies. Rather, she altogether fails to address the bulk of the hospital's evidence.

[13] We do not require a plaintiff bearing the burden of establishing a prima facie case to disprove as a cause of her discharge a source of her employer's dissatisfaction of which she is unaware. *See Flowers,* 552 F.2d at 1283. In this case,however,the record shows that the plaintiff was apprised of all formal disciplinary actions taken by Children's Memorial Hospital. She signed four of the notices, indicating that they had been reviewed with her by her supervisor. In addition, on numerous occasions the plaintiff was individually counselled as to the proper operation of laboratory quality control instruments.

In the face of this evidence of inadequate performance, the plaintiff cannot raise a material issue of fact on the question of the quality of her work merely by challenging the judgment of her superiors with regard to only one of these actions. *See Kephart,* 630 F.2d at 1223. The purpose of the prima facie case is to "eliminate[] the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine,* 450 U.S. at 253-54, 101 S.Ct. at 1094. The plaintiff has not succeeded in this threshold endeavor. When the party moving for summary judgment has carried its burden under Federal Rule of Civil Procedure 56(c), its opponent necessarily fails if she can do no more "than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). *See also Celotex,* 477 U.S. at 322-23, 106 S.Ct. at 2552 (movant is entitled to summary judgment against party that fails to make a showing sufficient to establish the existence of an element essential to its case). Uncontradicted evidence reveals that the plaintiff was not living up to her employer's legitimate expectations. It necessarily follows that there are insufficient facts in dispute to permit a finding that the plaintiff has made a prima facie showing of national origin discrimination. *See Kephart,* 630 F.2d at 1223.

III.

None of the remaining evidence offered by the plaintiff, presumably to show her employer's pretextual motive, disturbs our conclusion that she has failed to carry the initial burden of making out a prima facie case. Recognizing that the prima facie case method was "never intended to be rigid, mechanized, or ritualistic," *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978), and that "[t]here are no hard and fast rules as to what evidence must be considered as constituting a *prima facie* case," *Rowe v. Cleveland Pneumatic Company, Numerical Control, Inc.*, 690 F.2d 88, 97 (6th Cir.1982), we address the probative value of the plaintiff's evidence of derogatory remarks. *See Worthy v. United States Steel Corporation*, 616 F.2d 6988, 701 (3d Cir.1980) (evidence relevant to the question of pretext can be presented as part of the plaintiff's initial evidence going to the prima facie case itself); *Minority Police Officers Association v. City of South Bend*, 617 F.Supp. 1330, 1353 (N.D.Ind.1986) (same), *aff'd*, 801 F.2d 964 (7th Cir.1986).

The district court refused to consider the plaintiff's deposition testimony that Dr. Smith told her now deceased brother-in-law that the plaintiff should "move back to Korea." According to the court, the offer of proof rested on "rank hearsay." The plaintiff disputes this on appeal, insisting that the alleged statement is not hearsay because does not offer it for the truth of the matter asserted, to wit, that she should indeed return to Korea. Alternatively, the plaintiff contends that the statement is admissible as a "state of mind" exception to hearsay rule under Federal Rule of Evidence 803(3). She is wrong on both counts.

[14] We do not consider hearsay statements that are otherwise inadmissible at trial, and this limitation applies to deposition testimony based on inadmissible hearsay. *Randle*, 876 F.2d at 570 n. 4. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). The out-of-court statement at issue was made by the plaintiff's brother-in-law (the declarant), and doubtless is offered by the plaintiff "to prove the

truth of the matter asserted," that is, that Dr. Smith did in fact say what the brother-in-law later reported to the plaintiff. This in inadmissible hearsay, pure and simple.

[15] Federal Rule of Evidence 803 lists certain exceptions to the rule against hearsay, including "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed..." Fed.R.Evid. 803(3). However, the state of mind exception does not authorize receipt of a statement by one person as proof of another's state of mind. 4 DAVID W. LOUIBELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 441 (1980). *See United States v. Cintolo*, 818 F.2d 980, 1001 (1st Cir.), *cert. denied*, 484 U.S. 913, 108 S.Ct. 259, 98 L.Ed.2d 216 (1987); *Calhoun v. Baylor*, 646 F.2d 1158, 1162 (6th Cir.1981). *See also* H.R.REP. NO. 650, 93d Cong., 1st Sess. (1973) ("the Committee intends that [Rule 803(3)] be construed...so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person"), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7075, 7087.

Notwithstanding the plaintiff's assertions to the contrary, under Rule 803(3) the "declarant" whose state of mind is made relevant by the proffered statement can only be her brother-in-law, not Dr. Smith. Obviously, the brother-in-law's state of mind is irrelevant to the plaintiff's case. We conclude that the district court properly refused to consider this evidence.

[16] The district court did consider the plaintiff's deposition testimony that Marina Barrientos told here to "learn to speak English." The court found that this evidence was not particularly probative of the defendant's intent because employees in the clinical laboratory at Children's Memorial Hospital were required to speak English. The defendant argues on appeal that mandatory use of English insures effective communication within the laboratory as well as between laboratory employees and other hospital personnel. The plaintiff responds that thee is no evidence in the record that she ever spoke any language other than English at work,

and that Ms. Bartrientos' remarks go beyond an admonition to use English because the plaintiff was told to "learn" the language, a term of discriminatory import. The plaintiff draws upon *Minority Police Officers Association,* 617 F.Supp. at 1335, for the proposition that "evidence of racially derogatory remarks, slurs or actions may be relevant and probative evidence in support of a plaintiff's *prima facie* case of discrimination or to show that a defendant's proffered reason was pretext."

We begin with the observation that, even though she asserts on appeal that Ms. Barrientos made this remark "repeatedly," the plaintiff was less than certain on this score during her deposition. She testified that Ms. Barrientos made this remark "[m]aybe a few times." She could not recall if anyone else was present on these occasions. The issue is of no great moment, however, because as proof of discriminatory intent this evidence is exiguous.

Although the statement, "learn to speak English," could be circumstantial proof of Ms. Barrientos' discriminatory animus, the plaintiff has failed to show that it is related to the hospital's decision to discharge her. Remarks at work that are based on stereotypes of an individual's national origin do not invariably prove that national origin played a part in an employment decision; the plaintiff must show that the hospital relied on this impermissible criterion in making its decision. *See McCarthy v. Kemper Life Insurance Companies,* 924 F.2d 683, 686 (7th Cir.1991). In this case, neither the plaintiff's pereformance evaluations for the years 1985-1987 nor the seven formal disciplinary notices she received for substandard work (five of which were written by someone other than Marina Barrientos) mention her failure to use English. The plaintiff does not claim that Dr. Smith ever made a derogatory remark of one stripe or another to her,much less that the committee that reviewed and upheld Dr. Smith's decision harbored a discriminatory intent.

[17] Evidence of a supervisor's occasional or sporadic use of a slur directed at an employee's race, ethnicity, or national origin is generally not enough to support a claim under Title VII. *See, e.g., Nazaire v. Trans World Airlines, Inc.,* 807 F.2d 1372, 1380 (7th Cir.1986), *cert. denied,* 481 U.S. 1039, 107

S.Ct. 1979, 96 L.Ed.2d 819 (1987); *Torres v. County of Oakland,* 758 F.2d 147, 152 (6th Cir.1985); *Johnson v. Bunny Bread Company,* 646 F.2d 1250, 1257 (8th Cir.1981); *Rogers v. Equal Employment Opportunity Commission,* 454 F.2d 234, 238 (5th Cir.1971), *cert. denied,* 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972). We have held that such remarks, when unrelated to the decisional process, are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements were uttered by a decision maker. *Smith v. Firestone Tire and Rubber Company,* 875 F.2d 1325, 1330 (7th Cir.1989).[7] In opposing the defendant's summary judgment motion, the plaintiff has failed to provide the requisite nexus between Ms. Barrientos' remarks and the hospital's termination decision; evidence of the remarks, without more, does not give rise to an inference of discrimination.

7. *Smith* involved a discrimination claim brought under 42 U.S.C. § 1981. It is well settled in this circuit that the methods and order of proof applicable to § 1981 and Title VII claims are identical. *Randle,* § 76 F.2d at 568.

We point out that the plaintiff apparently does not dispute either the existence of the hospital's English-only policy or the defendant's assertion that other non-Korean medical technologists were instructed to use English. Moreover, Ms. Barrientos was the plaintiff's supervisor for approximately ten years. We find it implausible that she would begin to treat the plaintiff in a pejorative manner because of the plaintiff's national origin after eight years of a basically satisfactory and uneventful working relationship, especially when, between 1981-1984, Ms. Barrientos rated the plaintiff's performance as exceeding the hospital's expectations for quality and quantity of work.

It may well be, as the plaintiff contends, that she and Ms. Barrientos had a personality conflict of which Dr. Smith was aware.[8] However, we cannot conclude from this or from Ms. Barrientos' statements, at least without relying on a number of inferences, that the hospital's decision to terminate the plaintiff's employment was the product of intentional national original discrimination. *See Randle,* 876 F.2d at 570. *See*

*also Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir.1982) (to hold an employer liable under Title VII for actions of a supervisor, a plaintiff must show that the employer knew or should have known of the harassment but failed to take prompt remedial action).

Consequently, the plaintiff's reliance on *Tankha v. Costle*, 536 F.Supp. at 482, to support her argument that summary judgment should be denied where a personality conflict between an employee and supervisor "could conceivably have colored the supervisor's assessments of the plaintiff's performance" is unavailing. *Tankha* involved much more than evidence of a mere personality conflict. The plaintiff in that case opposed the employer's motion for summary judgment with affidavits that "engage[d] in almost point-by-point rebuttal" of the employer's claims that the plaintiff was fired for poor job performance. *Id.* The plaintiff also argued that his supervisors supported their allegations of his inadequacy using examples of his work product that they had previously found acceptable. *Id.*

8. Ms. Barrientos' remarks give rise, in Ms. Hong's words, to "the allowable inference that Barrientos may have harbored some racially discriminatory animus toward plaintiff, and that this could have affected her assessments of plaintiff's performance, or created a desire to see that plaintiff was terminated."

Such is not the case here. The record leaves us with the firm impression that the plaintiff's troubles on the job had far more to do with learning the laboratory's new computerized quality control system than contending with acts of invidious discrimination by her supervisors. We conclude that the plaintiff's proffer of Ms. Barrientos' remarks is insufficient to stave off summary judgment.

IV.

As part of her prima facie case of intentional discrimination under Title VII, the plaintiff has failed to establish that she performed her job well enough to meet her employer's legitimate expectations. Likewise, the evidence she presents in an effort to show that national origin was a factor in the hospital's decision to terminate her is insufficient to avert

summary adjudication. Accordingly, the district court's grant of summary judgment in favor of Children's Memorial Hospital is AFFIRMED.

## MOTION TO EXTEND TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Appellant, Young In Hong (444 W. Fullerton Parkway, Apt. 1005, Chicago, IL 60614) filing the motion "Pro Se" I am proposing to an extension of time to file a petition for writ of certiorari pursuant to Rule 30 of the Rules of The United States Supreme Court.

### THE INFORMATION

1. Jurisdiction: The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254 to review the final judgment of the United States Court of Appeals for the Seventh Circuit.

2. Identify the Judgment: The judgment sought to be reviewed is the May 12, 1993 judgment of the United States Court of Appeals for the Seventh Circuit (Case no. 92-1802) affirming the district court's entry of summary judgment, and that my petition for rehearing with suggestion for rehearing in banc was denied on July 22, 1993.

3. Attach the Judgment: Copies of the appellate court's May 12 decision and its July 22 order denying rehearing are attached to the motion. I have enclosed photocopies of the May 12 decision and the July 22 order denying rehearing for you to use.

I should then state that the petition for writ of certiorari is now due on October 20, 1993, and that I want a 60 days extension.

### THE REASONS

Based on, I could tell the Court that:

1. My previous attorney did not inform me of the time deadline for filing a certiorari petition;

2. I only recently learned of the deadline;

3. I have recently terminated my relationship with my previous lawyer;

4. I am looking for a new attorney to prepare a petition for writ of certiorari; and

5. Children's Memorial Hospital will not be hurt if I am granted an additional 60 days in which to file a petition for writ of certiorari.

An extension of time due to the fact that I did not file the motion more than ten days before the due date.

1ST CASE of Level 1 printed in FULL format.

YOUNG IN HONG, Plaintiff-Appellant, v. CHILDREN'S MEMORIAL HOSPITAL, Defendant-Appellee.

No. 92-1802

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

1993 U.S.App. LEXIS 18825

July 22, 1993, Decided

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 90 C 827, James B. Zagel, Judge.

Original Opinion of May 12, 1993, Reported at: 1993 U.S. App. LEXIS 11070.

JUDGES: Before Hon. MICHAEL S. KANNE, Circuit Judge; Hon. ILANA DIAMOND ROVNER, Circuit Judge; Hon. JOHN W. REYNOLDS, Senior District Judge.*

*The Honorable John W. Reynolds. Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.

OPINION: ORDER

On consideration of the petition for rehearing with suggestion for rehearing in banc filed in the above-entitled case, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS
Eastern Division

YOUNG IN HONG

V.

JUDGMENT IN A CIVIL CASE

CHILDREN'S MEMORIAL HOSPITAL

CASE NUMBER: 90 C 827
James B. Zagel

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, defendant's motion for summary judgment is granted. Summary judgment is entered in favor of defendant and against plaintiff, Young In Hong, on the claim of job discrimination.

March 10, 1992
Date

H. Stuart Cunningham
Clerk

Donald Walker
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| YOUNG IN HONG,<br>Plaintiff, | ) | |
| v. | ) | No. 90 C 827 |
| CHILDREN'S MEMORIAL HOSPITAL,<br>Defendant, | ) | Chicago, Illinois<br>March, 10, 1992<br>10:30 a.m. Ruling |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. ZAGEL

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THE CLERK: 90 C 827, Hong In Young v. Children's Memorial Hospital.

MR. FIORETTO: Good morning, Your Honor. Pat Fioretto on behalf of the plaintiff.

MR. CAVANAUGH: Good morning, Your Honor. Thomas Cavanaugh on behalf of defendant, Children's Memorial Hospital.

THE COURT: We're going to take a short recess because there are matters with respect to this case that I want to discuss. I have read the various volumes and I have some questions on which perhaps you can illuminate me, most particularly with respect to the records and comparisons between the plaintiff Hong and Iqbal Mohammed and Emilia Fulger, on which to a very large extent the case turns so far as I can tell insofar as the summary judgment is concerned.

But I want to get my materials so that we all have the same — so we're all reading from the same hymn book, and we'll take a short recess.

(Brief recess taken.)

THE CLERK: 90 C 827, Hong v. Children's Memorial Hospital.

MR. FIORETTO: Good morning, Your Honor. Once again for the record Pat Fioretto on behalf of plaintiff.

MR. CAVANAUGH: Good morning, Your Honor. Thomas Cavanaugh on behalf of defendant, Children's Memorial Hospital.

THE COURT: Okay. What I have in front of me is the various performance appraisals, and the three that we are focusing in on are Hong's — the basic position of the defendants is the comparative analysis of Hong, Mohammed and Fulger show that Hong was much worse than they were.

That's basically what your position is?

MR. CAVANAUGH: Correct, Your Honor. Both as far as the records as a whole in the context of disciplinary actions that were imposed, and even when one looks at the face of the evaluation itself, if one wants to take a microscopic view of the numeric evaluations assigned, when you look at Hong's evaluations dating back to 1984, her total score was 325. In 1985 it had dropped to a total score of 230. Significantly also in the first category, which is 50 percent of the evaluation, her

score had dropped from a three to two.

Similarly in '86 she drops to a total score of 225. The majority category, the first category remains at a two.

In her final evaluation in October of '87 she had dropped to 140 total score, and a score of one, which is the lowest in the first category.

In contrast if you look at Mohammed, in 1986 she had a total score of 260 as compared to Hong's 225. In the first category she had a numeric rating, a three as compared to Hong's two.

Similarly in 1987, although Mohammed had dropped in total score to 185 —

THE COURT: Wait. Let me find '87. I've got '86.

MR. CAVANAUGH: Mohammed's '87 is —

THE COURT: Okay. I have that in front of me.

MR. CAVANAUGH: In 1987, as I said, she dropped to a 185 total score, but that's still 45 points higher than Hong's score of 140.

And significantly in the first category, where again it's 50 percent of the total evaluation, Mohammed was rated at two as compared to Hong being rated at one.

Similarly on Fulger, her 1986 total score was 250 as compared to Hong's total score of 225. They both were assessed a numeric rating of two in the first category.

In '87 Fulger had a total score of 245, as compared to Hong's total score of 140. And again significantly in the first category she was assessed a rating—numeric value of two as compared to Hong's numeric value of one.

So even if one just looks at the numeric cumulative scores putting the rest of the record of disciplinary actions aside, they are not similarly situated. They are not appropriate comparisons.

THE COURT: Okay.

MR. CAVANAUGH: Fulger's evaluation begins at page 74 of the —

THE COURT: I have both of Fulger's. I'm just marking them in the pages so I can turn back to them. And I have both of Mohammed's. But what we are comparing is '86 and '87 for both —

MR. CAVANAUGH: Correct.

THE COURT: — because I know I also, for example, have '85 for Hong.

MR. CAVANAUGH: Correct.

THE COURT: And I don't think I have them for —

MR. CAVANAUGH: I don't believe you do.

MR. FIORETTO: In looking through the discovery responses, they weren't in the files for Mohammed or Fulger.

MR. CAVANAUGH: I believe the discovery was limited to '86 and '87 other than Hong.

THE COURT: Okay. Your response to that, counsel?

MR. FIORETTO: My response, Your Honor, is two-fold.

First of all, while one does look at it from a microscopic point of view, overall all three individuals were given the same rate of increase for that year. In such an institution when yearly reviews are given and the amounts of the increase is based on these reviews, the employee has only the bottom line of what the numbers and the percentages of that increase for that given year was. In comparing the three individuals accordingly, all three of three of them received the same merit increase for those given years.

Second, Your Honor, while Ms. Hong's performance did deteriorate over the end of her two-year tenure with the hospital, one cannot overlook her exemplary records for the past 20 years of her employment with the hospital.

Although she did receive some negative comments in her '86 and '87 appraisals, Ms. Mohammed and Ms. Fulger similarly received negative comments regarding their work performance.

THE COURT: Well, Fulger actually I don't recall receiving negative comments in '87.

MR. CAVANAUGH: Correct, Your Honor.

THE COURT: She did in '86, though.

MR. CAVANAUGH: There were two references to —

THE COURT: '86 says: "Excessive absenteeism. Turnaround stat time could improve." Stat I assume means tests that are to be performed immediately.

MR. FIORETTO: I stand corrected, Your Honor.

THE COURT: Right.

MR. FIORETTO: In '86; not '87.

THE COURT: Right. "Needs more organization."

In '87 Mohammed got a low rating on "Quality control criterion and necessary documentation," and the only comment was "No corrective action" and I don't understand the rest —

MR. CAVANAUGH: If I might, that refers, Your Honor, to quality control tests. If the computer shows a error on the test result, there are certain procedures that the tech is supposed to follow. It's the same issue.

THE COURT: And Mohammed got no adverse comments in '86.

Hong's comments in '86 — I'm disregarding the first one because it simply is a statement of, I guess, of what had happened before. Her comments: "Failure to recognize instrument problems, reported erroneous NA" — I assume sodium. K is potassium.

MR. CAVANAUGH: Correct, I believe.

THE COURT: Right. It's been a long time since I —

MR. FIORETTO: Since you took chemistry.

THE COURT: Right.

"Four times before getting a fresh control sample."

'87: "Stat work not completed within time frame. Does not help coworkers. Doesn't complete work. Occasionally fails to notice critical results."

Now, in the depositions the witnesses were asked to compare them or not?

MR. CAVANAUGH: In the Smith deposition, yes — I'm not sure on these particular — in other words, there was a comparison of Sagrado. They were compared. They were all reviewed.

THE COURT: Right.

MR. FIORETTO: By Dr. Smith.

MR. CAVANAUGH: By Dr. Smith, correct.

MR. FIORETTO: Individually.

MR. CAVANAUGH: Your Honor, if I could make one brief comment.

THE COURT: There is one thing. Was Barrientos actually deposed?

MR. FIORETTO: No.

THE COURT: No. Okay.

MR. CAVANAUGH: I wanted to just make a brief

comment in response to counsel's discussion of the evaluations as to the merit increase.

Dr. Smith testified in depth in his deposition relative to the procedure used for granting increases, and in essence what the process boils down to is the administration of the institution establishes a point range. 50 to a hundred points for sake of argument you might get a one percent increase. A hundred points to 200 points you might get a two percent increase, et cetera.

Hence, as happened in this case, in a particular year you might have a situation where in like 1986 Hong gets a 225 rating, Mohammed gets a 260, which is greater than Hong's, and Fulger gets a 250, which are all numerically higher total scores, but they all get the same merit increase because they fall within that same range.

So that argument of, well, they all got a three percent range is the equivalent of saying they were all performing basically equal or the records are basically equal I think mischaracterized the import of that factor.

THE COURT: I agree with you on that. I think that too much weight is placed on the pay increase, largely because my assumption is at least — it's not my assumption. It's essentially my finding from what I've read that employees were given pay increases within range particularly if some decision had been made to keep them on —

MR. CAVANAUGH: Basically correct.

THE COURT: — and the fact that the pay increases were the same does not within the structure of this employer's method of operation indicate differentiation, which is not, I think, uncommon with large institutions because they do tend to give pay increases in groups rather than individual merit increases, which may be one of our problems in this country.

But I didn't find that the case.

My question was since what's before me is not whether or not Hong has been discriminated against. The question before me is whether the plaintiff has enough to go to the jury. And what I think the plaintiff's argument basically is — I mean he's got several arguments, but the one that concerned me is whether in the evaluation protocols of Mohammed and

Fulger there was enough to say to a jury: look, there's difference in treatment.

Okay. I want to thank you. Also in light of this examination I'm actually prepared to rule. If you want to have a seat, I will give you my ruling on this summary judgment.

There is very little dispute over the facts here. And unless I state to the contrary, I adopt as the facts of this case paragraphs 1 through 23 of the defendant's statement of uncontested material facts either because they are agreed to, or if not agreed to, because there is no evidence to justify any refusal to agree.

The basic facts are that Hong In Young is a Korean-American who worked as a medical technologist at Children's Memorial for several years. She received a series of written annual appraisals as an average or above average performer. She may have received some oral criticism, but no written negative reports were issued to her until the 1985 appraisal.

In 1986 the Hospital made a change with respect to its laboratories, which it characterized as an upgrading of its laboratories and an upgrading in the performance of its technologists. Pursuant to this program the technologists all received training in new procedures and new instruments.

Young In Hong beginning in February 1986 started receiving formal written disciplinary actions for inattention to duty, for poor performance, for uncooperative behavior, and so forth. By October 20th, 1987, maybe 20 months later, 18, 20 months later, she received a Notice of Discharge.

There were other non-Korean medical technologists who were also disciplined and apparently some discharged, and the facts on who was discharged and their ethnic origins are not, as I say, in dispute.

The Hospital says basically that all medical technologists who engaged in similar conduct were treated similarly with respect to discipline and counseling. The plaintiff disputes this, but she does not dispute that the evaluation and appraisal of the performance of all medical technologists was conducted by using the same criteria regardless of the national ancestry of the person evaluated.

This was a guided appraisal. This is to say a preprinted appraisal form was used.

The evaluators were Dr. Frederick Smith, who was the Head of Clinical Pathology; and Ms. Marina Barrientos, who had been plaintiff's supervisor for a very long time, I think since 1967; and one Homer Wa, who was a night shift supervisor. The decision maker was Dr. Smith. He decided to terminate Young In Young. His stated reasons were her performance was repeatedly deficient and remedial measures to repair had failed, that she resisted supervision, refused to accept responsibility for errors, and that she could not be relied upon to perform at a level which would leave patient care unimpaired.

Young In Hong followed an existing procedure, grievance procedure. She took this to a committee of management and staff who heard her grievance and they upheld the discharge.

The criticisms directed against Hong in her appraisal also appear in the appraisals of other medical technologists, but I think not with the same range and profusion. The national origins of the technologists is quite diverse: Filipino, Chinese, Romanian, Pakistani, Irish, Japanese, African, East Indian, Hispanic and Pacific Islander. There are now — and apparently this is undisputed — no Korean-Americans employed as technologists.

The appraisals were pretty much all done by Marina Barrientos, who is a Filipino-American, and it appears that her evaluations of Young In Hong were generally favorable for many years. In fact, her favorable evaluations are argued in Hong's behalf.

Hong does point to Barrientos' comments to Hong that Hong should speak English or that Hong did not understand English as perhaps evidence of some ethnic discrimination, but it is, I'm satisfied from the evidence, a requirement that all laboratory employees speak the common language of English in order to perform the laboratory's work and communicate the results to other hospital personnel.

It also appears that Barrientos discussed the discussion of language with non-Korean medical technologists. The necessity to use English is not challenged by Hong.

Other than this there is no admissible evidence of some form of direct intent by any supervisor of Hong that indicates any form of ethnic or other prohibited animus.

There is an offer of proof that Dr. Smith stated on one occasion something that could be or could not be construed as negative about Koreans, but the offer of proof rests on rank hearsay and wouldn't be admissible, and I can't consider it on the summary judgment.

Hong argues that her job performance "was equal to or surpassed the performance of other non-Korean medical technologists during most of her 20-year tenure with the Hospital." And this seems quite clearly to be true, but the issue does not turn on the question of "most of her 20-year tenure," but rather on the last years of her tenure.

This is also, I might add, a field in which a long period of fine service is perhaps worth less than any other endeavor known to humanity because in terms of providing medical data which may be crucial to a treatment, 30 years of outstanding performance really do not justify retaining anybody for any length of time if their performance after 30 years fails to any significant degree.

The truth is that the good past performance appraisals in this case cut against her claim because the same supervisor who later gave her bad ratings gave her good ratings for many prior years.

There is evidence of personal animosity between Barrientos and Hong, but there is no hint of why Barrientos would begin to hold Korean ancestry against Hong after not having done so for several years. At best the evidence shows that there may be personal animus which developed over a period of time, but nothing that the source of that animus is Korean ancestry. And Barrientos is not the decision maker. She did not decide to fire Hong. Dr. Smith did. And his decision was upheld by persons, persons as to whom no evidence as to bias or animosity exists.

I think that Hong simply has insufficient evidence to refute the claim that her work was not meeting her employer's reasonable expectations of job performance at the time she was fired and a fortiori to show that the stated reason is a pretext.

What she turns to is the proposition that other employees who were not meeting expectations (and were not Korean-Americans) were not fired.

This depends on whether Hong can derive enough from a comparative analysis of the other employees' experiences to argue that there is enough evidence to survive a directed verdict motion on the claim of disparate treatment.

The two employees in question are those that we have discussed on the record: Iqbal Mohammed, who is a Pakistani, and Emilia Fulger, who is Romanian in origin.

I think for the reasons stated by counsel for the Hospital there is not sufficient similarity between the cases of Mohammed and Fulger on one hand and the case of Hong on the other.

In addition to the observations that were made with respect to the scoring of the three persons in question, Mohammed was involved essentially in two instances of disciplinary action whine Hong was involved in nine. The appraisals of Fulger show shortcomings in her work, but there is not medical technologist presently employed that had as many problems as did Hong.

The only other medical technologist who was fired was a Filipino-American whose record I would say is roughly comparable to that of Hong and suffered the same fate.

Roughly comparable is the correct word because the other technologist, one Campo Sagrado, committed more errors that had the potential of jeopardizing patients than did Hong. On the other hand, Hong's record shows for many months on end an unwillingness or inability to be supervised or corrected and thus little promise for future improvement.

The case, frankly, is to thin to permit a trier of fact to return a verdict for Hong.

I might say that I took a great deal of time with this case, and one of the reasons I took a great deal of time with this case is because I threw it out on limitations grounds once before, and the Court of Appeals in an opinion with which after consideration I'm essentially in agreement returned the case back to me, and there's certain reluctance at least on my part having thrown a case out once and done so incorrectly to throw it out again.

So the the — there was, I think, a relatively strong emotional pull to try to deny this motion for summary judgment; but the truth is if this case went to trial, if it were a

jury, there would be a directed verdict, and if it were a bench trial, there would be a Rule 41 finding, and I just don't see any purpose now knowing what the facts of the case are to continue on with it.

The minute order will read for the reasons stated in open court the defendant's motion for summary judgment is granted.

Thank you, counsel.

MR. FIORETTO: Thank you, Your Honor.

MR. CAVANAUGH: Thank you, Your Honor.

* * * * * * * * * * *

CERTIFICATE

I hereby certify that the foregoing is a true and correct transcript of the above-entitled matter.

| Wanda L. Barnes | 3/26/92 |
|---|---|
| Official Court Reporter | Date |

SUPREME COURT OF THE UNITED STATES

No. A-372

Young In Hong, Petitioner
v.
Children's Memorial Hospital

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including December 19, 1993.

/s/ John Paul Stevens
Associate Justice of the
Supreme Court of the
United States

Dated this 27th day of October, 1993.

Supreme Court, U.S.
FILED
MAR 7 1994
OFFICE OF THE CLERK

(2)

No. 93-1269

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

YOUNG IN HONG,

*Petitioner,*

v.

CHILDREN'S MEMORIAL HOSPITAL,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13 pp

## QUESTION RESTATED

Whether the Seventh Circuit's statement of the elements of a prima facie case of disparate treatment discrimination conflicts with applicable decisions of this Court or other courts of appeals.

## STATEMENT REQUIRED BY RULE 29.1

Children's Memorial Medical Center, an Illinois not-for-profit-corporation, is the parent company of Children's Memorial Hospital, also an Illinois not-for-profit-corporation. Children's Memorial Hospital has no non-wholly-owned subsidiaries or affiliates.

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No. 93-1269

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

YOUNG IN HONG,

*Petitioner,*

v.

CHILDREN'S MEMORIAL HOSPITAL,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In this case, the Court of Appeals stated and applied the elements of a prima facie case of intentional discrimination. This Court established those elements in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and has repeatedly reaffirmed them. The Court of Appeals followed *McDonnell Douglas* and subsequent decisions of this Court in holding that Petitioner had failed to establish a prima facie case because she was not meeting her employer's legitimate job expectations at the time of her discharge. This holding, and the reasons for it, involve matters of well-settled law as applied to the particular facts of this case. The case presents no issue appropriate for review by this Court.

## COUNTERSTATEMENT OF THE CASE

In 1968, Children's Memorial Hospital hired Petitioner Young In Hong, an American citizen of Korean national origin, as a medical technologist in the hospital's Clinical Chemistry Laboratory. Hong worked there part-time until 1976, when she became a full-time medical technologist. From 1976 until her discharge in October 1987, Hong's immediate supervisor was Marina Barrientos. Barrientos conducted annual performance evaluations of Hong's work.

Prior to 1985, Hong's performance evaluations were generally favorable. In early 1986, however, the hospital undertook an internal evaluation of laboratory operations in order to upgrade laboratory equipment and performance. Consequently, the hospital installed new equipment, including a computerized quality control system for specimen testing.

In 1985, 1986 and 1987, Petitioner's annual performance evaluation scores dropped markedly. Among other things, Petitioner was cited for excessive absenteeism, failure to perform assigned tasks in a timely manner, failure to identify instrument malfunctions during testing procedures, failure to report test results to her supervisors, failure to maintain laboratory inventory, and failure to follow laboratory quality control and management procedures. By 1987, Petitioner received a performance evaluation score which fell below the hospital's standard of competency.

From February 1986 to July 1987, Petitioner was also issued seven formal written disciplinary notices for various performance deficiencies. Two of these reports resulted in two and three-month probationary periods. Another resulted in a two-day suspension.

On October 20, 1987, after Petitioner had received yet another disciplinary notice, Dr. Frederick Smith sent Peti-

tioner a memorandum terminating her employment with the Clinical Chemistry Laboratory.[1] The memo indicated that this action was based on Petitioner's unsatisfactory performance over the previous year and a half.

Petitioner then filed suit in federal district court claiming that she had been discharged based on her national origin in violation of Title VII of the Civil Rights Act of 1964. The hospital answered the complaint and moved for summary judgment on two grounds: (1) that Petitioner failed to establish a prima facie case of discriminatory discharge in that she failed to show that she was meeting her employer's legitimate expectations at the time of her discharge; and (2) assuming the existence of a prima facie case, Petitioner failed to produce sufficient evidence from which a jury could reasonably find that the hospital's stated reason for terminating her — unsatisfactory job performance — was a pretext for discrimination.

The district court granted the hospital's motion for summary judgment. The court held that Petitioner's case was "too thin to permit a trier of fact to return a verdict for Hong" because she had produced "insufficient evidence to refute the claims that her work was not meeting her employer's reasonable expectations of job performance at the time she was fired and a fortiori to show that the stated reason [for discharge] is a pretext" (App. 35, 34).[2] The district court also found that Petitioner had failed

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[1] As the Division Head of the hospital's Department of Clinical Pathology, Dr. Smith supervised the Clinical Chemistry Laboratory. He did not participate in annual evaluations of medical technologists.

[2] Petitioner failed to paginate either the petition or the appendix. Respondent has paginated them for her in accordance with Supreme Court Rule 33.3.

to show any similarly situated non-Koreans who were treated differently; the only non-Korean with a disciplinary record comparable to Petitioner's was likewise terminated.

The Court of Appeals for the Seventh Circuit affirmed. Using the analytic framework established by this Court, the Court of Appeals held that Petitioner had failed to establish a prima facie case because she failed to show that her performance on the job was adequate at the relevant time — when she was discharged (App. 12). The court considered each of Petitioner's arguments but was unpersuaded by her "bare assertion of disparate treatment" (App. 13).

Petitioner filed a petition for rehearing with the Seventh Circuit with request for rehearing in banc. That petition was denied.

## REASONS FOR DENYING THE WRIT

### The Writ Should Be Denied Because The Decision Below Comports With The Decisions Of This Court And Other Courts Of Appeals.

The petition does not merit this Court's attention. Petitioner asks this Court to identify the proper burden of proof to establish a prima facie case of disparate treatment discrimination under Title VII. The Court did so 21 years ago in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), a case which Petitioner fails even to cite.[3] Nor does Petitioner cite the numerous decisions

[3] There, the Court stated that a plaintiff alleging racial discrimination in hiring must show "(i) that he belongs to a racial minority; (ii) that he applied and *was qualified* for a job for which the em-

(Footnote continued on following page)

of this Court since *McDonnell Douglas* in which the Court reiterated and explained the elements of a prima facie case of intentional discrimination. *See, e.g., Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575-77 (1978); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981); *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747 (1993).

The Seventh Circuit's decision in this case is wholly consistent with applicable decisions of this Court. The Court of Appeals held that Petitioner had failed to show that she was "qualified" for her position at the time she was discharged. The court first stated that Petitioner must show that "she was doing her work well enough to meet her employer's legitimate expectations" (App. 11). The court then held that Petitioner had failed to meet this burden and, therefore, could not make out a prima facie case of discrimination. Nowhere does Petitioner contend that the Seventh Circuit's analysis misconstrues the "qualifications" element (or any other element) under *McDonnell Douglas*.[4]

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[3] *continued*
ployer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, 411 U.S. at 802 (emphasis added).

[4] Any such argument would be meritless. No plaintiff could tenably contend that she was "qualified" for the position at issue notwithstanding that she failed "to meet her employer's legitimate expectations." Moreover, the Court has long recognized that "the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to different factual situations." *McDonnell Douglas*, 411 U.S. at 802 n.13. *See also Furnco*, 438 U.S. at 575 ("The method suggested in *McDonnell Douglas* . . . was never intended to be rigid, mechanized or ritualistic"). Thus, whether the Seventh Circuit used the exact words of *McDonnell Douglas* is of no consequence as long as it generally followed the *McDonnell Douglas* approach.

Instead, Petitioner attempts to glean a "split among the various Circuit[s]" (Pet. 3-4) from the phraseology which courts have used in restating or applying the qualifications element under *McDonnell Douglas*. There is no split; any differences in phraseology are semantic at most. Indeed, virtually all of the passages cited by Petitioner are rooted in uncontroversial facets of *McDonnell Douglas* or subsequent decisions of this Court.[5] In sum, none of the cases or passages cited by Petitioner reflect a material divergence of views among the courts of appeals as to the elements for proving a prima facie case.

The remainder of the petition consists of arguments that the Court of Appeals misapplied the law by excluding some of Petitioner's evidence and discounting her other evidence (Pet. 10-11). These arguments boil down to a request that the Court reevaluate the record. Petitioner advances no special or important reasons why these arguments warrant a writ of certiorari. None of Petitioner's arguments raise a new or important federal question. None of them raise a conflict between the Court of Appeals'

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[5] For example, Petitioner at one point notes that the Third Circuit "made it clear . . . that this [prima facie standard] is an easy standard to meet." (Pet. 4, citing *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 523 (3d Cir. 1992)). But that is nothing new; this Court recognized as much in *Burdine*, 450 U.S. at 253 ("The burden of establishing a prima facie case of disparate treatment is not onerous."). At another point, Petitioner suggests that the Fourth Circuit was somehow out of line in stating that a plaintiff must "prove a prima facie case by eliminating the most common non-discriminatory reason" for his rejection (Pet 4., citing *Wileman v. Frank*, 979 F.2d 30, 33 (4th Cir. 1992)). In *Wileman*, however, the court was simply restating the long-established proposition that proof of a prima facie case serves the litigation-focusing function of eliminating the most common non-discriminatory reasons for the plaintiff's rejection. *See Burdine*, 450 U.S. at 253-54. *See also Furnco*, 438 U.S. at 577.

ruling in this case and applicable decisions of this Court. And none of them evince a conflict within the circuits over important evidentiary or other issues. Rather, Petitioner reargues the merits of her case as if she had an appeal to this Court as a matter of right. That is plainly not correct.[6]

This Court has been faced with some vexing issues in the employment discrimination field; Petitioner does not present such an issue. As this Court has explained, disparate treatment is "the most easily understood type of discrimination." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). And within the confines of disparate treatment analysis, proving the elements of a prima facie case is the most straightforward and rudimentary of tasks. That Petitioner could not do so in this case means only that the case was "too thin to permit a trier of fact to return a verdict for Hong" (App. 35).

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[6] In any event, the decisions below fully comport with established evidentiary and other principles. The Seventh Circuit properly refused to consider an alleged remark by Dr. Smith that Petitioner should "move back to Korea." The out-of-court statement was made by Petitioner's brother-in-law and was properly held to be rank hearsay (App. 17-18). The court properly discounted alleged anti-Korean remarks by Marina Barrientos as sporadic comments by a non-decision-maker which were unrelated to Petitioner's discharge (App. 18-20). Petitioner's other "evidence" of discrimination — alleged discipline and evaluation scores of non-Koreans who were not discharged, plus her quarrel with one out of seven instances of formal discipline — was also unavailing as a matter of law. The court rightly concluded that Petitioner had failed to show any similarly situated non-Koreans who had not been discharged (App. 14). The court further noted Petitioner's complete failure to controvert six of the seven formal disciplinary notices (App. 14-16).

## CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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